

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 IN SEATTLE

4 UNITED STATES OF AMERICA, et al.,)
5)
6 Plaintiffs,) No. C70-9213
7) Subproceeding 01-1
8 v.)
9) FINAL
10 STATE Of WASHINGTON, et al.,)
11)
12 Defendants.)
13)

14 CLOSING ARGUMENTS
15

16 BEFORE THE HONORABLE RICARDO S. MARTINEZ

17 June 7, 2010

18 APPEARANCES:

19 Mr. Peter C. Monson
20 U.S. Department of Justice
21 Environment & Natural Resources Division
22 Rogers Federal Building
23 1961 Stout Street - 8th Floor
24 Denver, CO 80294

25 Rene David Tomisser
Frona C. Woods
Douglas D. Shaftel
Philip M. Ferester
Attorney General's Office
P.O. Box 40100
Olympia, WA 98504

John C. Sledd
KANJI & KATZEN
100 South King Street, Suite 560
Seattle, WA 98104

1
2 Alan C. Stay
3 Richard Reich
4 Muckleshoot Indian Tribe
5 39015 172nd Avenue S.E.
6 Auburn, WA 98092

7 Daniel A. Raas
8 Kevin Lyon
9 Regina Hovet
10 Mary Neil
11 RAAS JOHNSEN & STUEN PS
12 P.O. Box 5746
13 Bellingham, WA 98227

14 Mason D. Morisset
15 MORISSET SCHLOSSER AYER & JOZWIAK
16 801 Second Avenue
17 11115 Norton Building
18 Seattle, WA 98104

19 Alix Foster
20 Swinomish Indian Tribe
21 11404 Moorage Way
22 La Conner, WA 98527

23 Harold Chesnin
24 Confederated Tribes of Chehalis
25 1810 43rd Ave. E. Suite 203
Seattle, WA 98112

Lauren Rasmussen
Port Gamble S'Klallam and Jamestown
S'Klallam Tribes
1904 Third Avenue
Securities Building, Suite 1030
Seattle, WA 98227

John Hollowed
Northwest Indian Fisheries Commission
6730 Martin Way East
Olympia, WA 98506

Samuel Stiltner
Puyallup Tribe
3009 Portland Avenue
Tacoma, WA 98404

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Richard Gruber
Brian C. Berley
Makah Tribe
ZIONTZ CHESTNUT VARNELL BERLEY & SLONIM

Yale Lewis
Law Offices of O. Yale Lewis III

Katherine Kruger
Quileute Tribe

Howard Arnett
KARNOPP PETERSEN
Warm Springs Tribe

Craig Dorsay
DORSAY & EASTON
Hoh Tribe

1 THE CLERK: This is the matter of the United States,
2 et al versus the State of Washington, case number C70-9213,
3 assigned to this Court. Will counsel please make their
4 appearances for the record.

5 THE COURT: Who is going to start? Mr. Sledd.

6 MR. SLEDD: May it please the Court. John Sledd for the
7 Sauk-Suiattle, Stillaguamish, Nisqually, Squaxin Island,
8 Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam,
9 Lower Elwha Klallam and Hoh Tribes.

10 MR. MONSON: Good afternoon, your Honor. Peter Monson
11 for the United States.

12 MR. STAY: Good afternoon, your Honor. Alan Stay for
13 just the Muckleshoot Indian Tribe.

14 THE COURT: Thank you.

15 MS. FOSTER: Good afternoon, your Honor. Alix Foster
16 for the Swinomish Indian Tribal Community.

17 MR. RAAS: Good afternoon, your Honor. Dan Raas for the
18 Lummi Nation.

19 MS. RASMUSSEN: Good afternoon. Lauren Rasmussen,
20 co-counsel for the Port Gamble S'Klallam and the Jamestown
21 S'Klallam Tribes.

22 MR. MORISSET: May it please the Court, Mason Morisset
23 for the Tulalip Tribes.

24 MR. HOLLOWED: May it please the Court, my name is John
25 Hollowed with the Northwest Indian Fisheries Commission.

1 MR. STILTNER: Your Honor, I am Sam Stiltner, attorney
2 for the Puyallup Tribe.

3 MR. ZEILMAN: Tom Zeilman, attorney for the Yakama
4 Nation.

5 MR. ARNETT: Howard Arnett for the Warm Springs Tribe of
6 Oregon.

7 MR. REICH: Richard Reich for the Muckleshoot Tribe.

8 MR. LEWIS: Good afternoon. Yale Lewis, co-counsel for
9 the Quileute Tribe.

10 MS. KRUEGER: Katherine Krueger, co-counsel for the
11 Quileute Tribe.

12 MS. HANSEN: Michelle Hansen for the Suquamish Tribe.

13 MS. NEIL: Mary Neil, attorney for the Lummi Nation.

14 MR. GRUBER: Brian Gruber for the Makah Tribe.

15 MR. LYON: Kevin Lyon for the Squaxin Island Tribe.

16 MS. MARTIN: Connie Sue Martin for the Nooksack Tribe.

17 MR. SUAGEE: Steve Suagee, Lower Elwha Klallam.

18 MS. HOVET: Regina Hovet, Squaxin Island Tribe.

19 THE COURT: Anyone else from the tribes?

20 MR. TOBIN: Bill Tobin for the Nisqually Tribe.

21 MR. CUSHMAN: Chris Cushman for the Nisqually Tribe.

22 MS. WILLIAMS: Sheri Williams for the Lummi Nation.

23 THE COURT: All right.

24 MR. TOMISSER: Rene Tomisser on behalf of the State of
25 Washington.

1 MS. WOODS: Good afternoon, your Honor. I'm Fronda
2 Woods for the State of Washington.

3 MR. SHAFTEL: Doug Shaftel with the State of Washington.

4 MR. FERESTER: Phil Ferester, Assistant Attorney General
5 for the State of Washington.

6 THE COURT: Thank you, all. The Court has had an
7 opportunity to fully review the materials submitted, the
8 post-trial briefing, the proposed Findings of Fact and
9 Conclusions of Law, and has set aside this afternoon to allow the
10 parties an opportunity to try to convince me in oral argument as
11 to why I should adopt those proposed Findings of Fact and
12 Conclusions of Law.

13 Mr. Sledd, I understand you will be arguing on the tribes'
14 behalf; is that correct?

15 MR. SLEDD: I will.

16 MR. ZEILMAN: Your Honor, before the argument starts, I
17 wanted to announce that our good friend and colleague and officer
18 of the court, Timothy Roy Weaver, died March 22nd, 2010, at the
19 age of 65, after a long, 18-year battle with cancer. He was one
20 of the few among us who remembers, almost from the very
21 beginning, the early years of this case. And he will be missed
22 by everybody.

23 THE COURT: I'm sure he will. Thank you.

24 MR. SLEDD: May it please the Court, John Sledd on
25 behalf of the ten tribes I named earlier. I will be arguing on

1 behalf of all the plaintiff tribes, your Honor.

2 I understand the Court has set aside an hour for each side.
3 I am hoping in some prepared remarks and response to questions,
4 if the Court has any, to go for about a half hour. Mr. Monson,
5 for the United States, would like to have about five to ten
6 minutes, and then the plaintiffs would like to reserve the
7 remainder of their time for rebuttal, if they may.

8 Your Honor, I want to take this opportunity to address four
9 critical points that were established in the trial that show the
10 need for and the propriety of the injunction that the plaintiffs
11 have presented to the Court.

12 First is that fixing state culverts and keeping them fixed
13 will significantly improve THE tribal salmon harvest.

14 Second, that accelerating correction of state barrier
15 culverts is essential to vindicate treaty rights and to recover
16 salmon runs.

17 Third, the injunction the plaintiffs have proposed will
18 trigger no state budget crisis.

19 And, fourth, that the injunction, by providing some basic
20 ground rules for the correction of culverts, will avoid future
21 disputes between the parties, while preserving the state's
22 discretion on how to fix those culverts.

23 There are, given the time limits, a number of issues I do not
24 intend to address. One of those is the state's motion for
25 reconsideration of your Honor's summary judgment decision. The

1 issues that were raised at summary judgment of what the treaty
2 imposes by way of duties and whether the state has violated those
3 was thoroughly briefed, it was thoroughly argued, it was decided.
4 The purpose of the recent trial was to go beyond that and decide
5 a remedy. And that is what I want to address.

6 The first point I want to make from the evidence at trial,
7 your Honor, is the proof of irreparable harm to tribal fisheries
8 which the proposed injunction will resolve.

9 The Court's summary judgment decision found that culverts
10 contribute significantly to a substantial diminishment of tribal
11 harvest. And the evidence at trial confirmed that. It showed an
12 unrelenting decline in salmon populations and harvests since the
13 beginning of the 20th century. It showed that tribal harvest
14 which started to grow after the Boldt decision reached a peak and
15 is now also in unrelenting decline. It has fallen back to the
16 abysmal levels that prompted the filing of U.S. v. Washington in
17 the first place.

18 The affects of the shortage of salmon on the tribes was made
19 clear in the testimony of four tribal members, and an additional
20 tribal biologist, from throughout the case area, who testified
21 that their fisheries have been circumscribed in time and in
22 place, that they are no longer able to make a livelihood from
23 their fishing, and that they are compelled to celebrate their
24 first salmon ceremony by drawing fish from a freezer rather than
25 from the streams in their own homelands.

1 The contribution of state barrier culverts to this situation
2 is clear. This fall, as nine years ago when this case was filed,
3 and as three years ago when your Honor issued a summary judgment
4 decision -- There we go. This is what salmon will find this
5 fall, your Honor, when they return to the waters of the case
6 area, over 1100 state barrier culverts in every basin throughout
7 the case area that block their passage to the habitat they need
8 to reproduce.

9 The Department of Fish and Wildlife's biologist, Brian
10 Benson, testified upstream of just 800 of those barrier culverts
11 there lie almost five million square meters of habitat, and
12 almost a thousand miles of stream.

13 Tyson Waldo, a biologist with the Northwest Fisheries
14 Commission, who testified for the plaintiffs, said that there is
15 an additional 200 miles blocked by DNR culverts.

16 The consequences of losing 1200 miles of salmon stream are
17 not speculative, they are not hypothetical. They follow from a
18 very simple principle that was set out by Mr. Wasserman, the
19 biologist for the Swinomish Tribe, in his testimony. He said,
20 "The number of fish available for harvest and spawning is, in
21 large measure, dependent upon having access to sufficient fresh
22 water habitat to maximize the number of smolts." Or as your
23 Honor put it in a question he asked to another witness, Dr. Jeff
24 Koenings: "It all starts with the habitat, doesn't it?"

25 No testimony from any practicing biologist at trial was to

1 the contrary, and the entire state culvert correction program is
2 predicated on the truth of that principle.

3 The state, in the face of this evidence, nevertheless,
4 contends that plaintiffs have not proven any irreparable harm.
5 The state would demand a precise tribe by tribe, culvert by
6 culvert accounting of loss. But that is impossible. The state's
7 witness, Mr. Barber, another biologist, testified it is not
8 possible to tell how many fish are cost by one culvert because
9 the biology is too complicated. Just because the harm cannot be
10 specifically quantified does not mean that no irreparable harm
11 exists. Mr. Barber continued and said, "It is not necessary to
12 know the actual number of fish increase to know what you are
13 doing has benefit to fish."

14 And, moreover, as Mr. Rawson, the biologist for the Tulalip
15 Tribe, testified, "It is possible to determine not just the
16 existence, but the magnitude of harm to the fisheries, and the
17 benefit from correcting culverts by looking at the amount of
18 habitat."

19 Dr. Sekulich, the state witness and former WDFW employee,
20 went a step further. He said he could think of no better way to
21 quantify the potential production that is lost to these culverts
22 than to multiply the habitat area times the production value per
23 meter squared. That is why he used that methodology in his
24 priority index; it's why he used it in his effort in Exhibit
25 AT-104, where he calculated that every linear meter of habitat

1 loss cost half a salmon, which translate to about 750 a mile.
2 And that's why he used that habitat surrogate times a production
3 value in the 1997 Fish Passage Inventory Final Report where he
4 told the legislature that the potential production upstream of
5 DOT barrier culverts was 200,000 adult salmonids a year.

6 Using habitat area as a surrogate for the numbers of lost
7 fish is not a novelty. It has been approved in the ESA
8 incidental take context, if the biology makes it impossible to
9 calculate the precise numbers of fish taken. For that
10 proposition, your Honor, there is a case, Northwest Environmental
11 Defense Center versus National Marine Fisheries Service from the
12 District of Oregon, decided about six or eight weeks before trial
13 began in this case.

14 And the state did something similar in the Gillette case,
15 which we cited in our motion in limine papers prior to trial,
16 where the state proved the loss of adult salmon from illegal
17 stream bulldozing by multiplying an estimated number of redds in
18 a given length of stream and calculating an estimated number of
19 adults that could come back from that. And when that methodology
20 in Gillette was challenged as too speculative, the State Court of
21 Appeals said, "The court should not immunize a defendant once
22 damage has been shown merely because the extent or amount thereof
23 cannot be ascertained with mathematical precision."

24 The state goes on to argue that proof should be made of
25 tribe-by-tribe harm before we can obtain an injunction case

1 area-wide. That raises the wrong question, your Honor. The
2 relevant question is not whether every tribe is harmed, but
3 whether barriers in all parts of the case areas harm at least one
4 of the plaintiffs' tribes. If they do, then they are subject to
5 injunction. As Mr. Waldo's map and his table of lost habitat
6 showed at trial, every basin in the case area has barrier
7 culverts and every one has habitat blocked by state barrier
8 culverts.

9 The decisions of this Court in U.S. v. Washington makes
10 equally clear that there is a tribal fishing area in every single
11 part of the case area.

12 And, moreover, the fish that originate from one barrier
13 culvert don't just impair harvest in that particular basin.
14 Wherever those fish go -- would go, there are fewer of them to be
15 caught, affecting the harvest of tribes throughout the case area.
16 They can even affect the harvest from completely unrelated basins
17 by forcing tribes to ratchet down their catch in so-called mixed
18 stock fisheries. Case area-wide relief is thus completely
19 justified.

20 In addition to demanding a biologically impossible
21 specificity in the proof of harm, the state suggests that fixing
22 its barriers will not help salmon or tribal harvest because there
23 are other barriers on the same streams. But the state offers no
24 legal support for the notion that equity should condone their
25 violations because there are other barriers out there which

1 violate state law and which the state has chosen to allow to
2 remain. Nor does the evidence show that those non-state barriers
3 would make an injunction against the state barriers ineffective.
4 The key evidence for that proposition, your Honor, is a series of
5 tables that were done by Mr. Benson and were worked on by
6 Mr. Waldo, that analyzed 315 WSDOT culverts where there has been
7 a complete enough habitat survey to actually locate the barriers
8 upstream and downstream.

9 I would refer the Court to Exhibits AT-285, AG-288 and W-133.
10 What those exhibits show is that for those 315 culverts, more
11 than half of them have no downstream barriers, and 80 percent of
12 them have at most one downstream barrier.

13 Moreover, those barriers are highly concentrated in certain
14 basins. Fully ten percent of the barriers upstream of those 315
15 DOT culverts are on a single drainage, Little Bear Creek, near
16 Bothell. Not coincidentally, that is the Little Bear Creek which
17 state counsel directed Mr. Benson to testify about. It is an
18 outlier.

19 Many of these non-state barriers are also only partial
20 barriers. Again, Mr. Benson looked at this, he found that
21 70 percent of the barriers below those 315 DOT culverts are only
22 partial. In those, 70 percent of the time, that means that there
23 are fish still getting past -- some fish who would still benefit
24 by removal of that DOT culvert upstream.

25 The evidence also shows those non-state barriers are coming

1 out. The state's tenth anniversary report on the Salmon Recovery
2 Act, which is Exhibit 085(e), the state exhibit, shows that more
3 than 3,500 barriers have been removed statewide since 1999. If
4 you subtract out the number of fixes by the state, which is in
5 the record, you are left with a conclusion that 2,500 of these
6 other barriers have come out in the past ten years. They are
7 coming out.

8 If the state is, nonetheless, concerned about how non-state
9 barriers will affect its corrections in the future, it is free
10 under the proposed injunction to prioritize correction in basins
11 that have fewer of those non-state barriers. The state could
12 even choose under the injunction to completely defer correction
13 of some DOT barriers that have a lot of non-state barriers
14 associated to the end of the DOT culverts' useful life, as long
15 as by doing that they don't go over ten percent of the total
16 amount of habitat that is deferred.

17 In summary, regarding proof of irreparable harm, your Honor,
18 the plaintiffs clearly proved it, and they proved an injunction
19 would effectively remedy it, and would restore the fish that
20 these culverts have been taking out of these streams for decades.

21 Turning to my second point, your Honor. The evidence showed
22 that an injunction accelerating DOT culvert corrections would
23 vindicate the treaties, it is essential to do so, and it is
24 essential to recovering the salmon.

25 As the Department of Fish and Wildlife and the Department of

1 Transportation stated in a pair of reports to the legislature in
2 1997, "The rate of barrier correction must be accelerated if
3 Washington's wild salmon and trout stocks are to recover."
4 Mr. Benson testified at trial that is still true. The rate still
5 needs to be accelerated. And it is easy to see why. The state's
6 correction rate, if it continues, will perpetuate harms to the
7 fish and the fisheries for decades.

8 Let's put aside the Parks and Recreation Commission, which
9 hasn't even finished its inventory and has fixed just one
10 culvert. Put aside the handful of culverts fixed and the
11 relatively small number that DFW has. Put aside even DNR,
12 despite the fact that Mr. Nagygyor testified for them that they
13 will have trouble meeting their 2016 goal statewide, because they
14 have a \$50 million shortfall in their access road fund they use
15 to pay for these corrections. Focus just on DOT, and focus just
16 on the 800 culverts that have more than 200 meters of habitat.

17 The Department of Transportation in their annual reports
18 tells us how many they have fixed. If you look at the most
19 recent one that was in evidence, it will show you that there have
20 been 176 successful DOT culvert corrections statewide since 1991.
21 176. Two-thirds of those have been in the case area. And that
22 translates to about six and a half corrections per year. And if
23 you do the math on 800 DOT pipes, at six and a half a year, it
24 will take 123 years just to fix those 800.

25 This Court in another subproceeding in U.S. v. Washington

1 many years ago said that the presumption is that the tribes are
2 entitled to enforcement of their treaty rights without delay.
3 And the plaintiffs submit, your Honor, 123 years of further delay
4 is completely inconsistent with that presumption, and with their
5 treaty rights.

6 I would point out, your Honor, if the state is correct in its
7 own cost estimates, in its own funding predictions of about
8 \$15 million a year, that situation is actually worse. You do the
9 math there. They are only going to be able to fix about four or
10 four and a half culverts a year. And we are looking at close to
11 two centuries to solve this problem.

12 Now, despite the evidence of the abysmal pace of correction
13 currently, at trial and in its post-trial briefing, the state has
14 argued that accelerating culvert corrections will actually hurt
15 salmon recovery. The only support for their claims is the former
16 biologist, Dr. Jeffrey Koenings. He has claimed that the state
17 has comprehensive, bottom up, integrated, federally approved,
18 holistic plans, prioritized by fingerprinting the limiting
19 factors in each of the watersheds. And he claims that fixing the
20 culverts any faster will upset the apple cart of salmon recovery
21 by taking money from higher priority efforts. Well, that
22 testimony is real long on buzz words, but it is short on
23 substance. The state didn't put any of the salmon recovery plans
24 into evidence so your Honor could see what they do. In fact,
25 there are only two. As Dr. Roni, the United States' witness,

1 Mr. Wasserman for Swinomish, Mr. Rawson, the Tulalip biologist,
2 all testified, those are Endangered Species Act plans Puget Sound
3 Chinook and Hood Canal summer chum. They are based on ESA
4 recovery standards. Don't put this fish into extinction. They
5 are not based on tribal needs for harvest that were promised at
6 treaty time.

7 There are no plans for other species in other parts of the
8 case area.

9 In response to the Court's question, Dr. Koenings actually
10 admitted that his view of -- his vision of integrated, holistic,
11 et cetera, plans, that tie all the four Hs together has not been
12 done on a systematic basis. And not only have the plans that
13 would integrate all these things not been done, but the basic
14 scientific analysis that would be needed to underlie such
15 integrated, prioritized plans has not been done.

16 Again, Dr. Roni and Mr. Wasserman and Mr. McHenry, the Elwha
17 biologist, testified that in order to prioritize preservation
18 efforts, in the way that Dr. Koenings described as desirable, you
19 have to have detailed watershed assessments. So look at each
20 species in each basin and identify what is the limiting factor
21 for each species there.

22 The tribal biologists testified that such assessments exist
23 for only a few basins and a few stocks. The tribal biologists
24 agreed that the limiting factors analysis that the state has done
25 and touted as adequate to this purpose are not. The LFAs, there

1 is one in evidence, the statewide summary, W-087(h), and it
2 confirms this. It is merely a list of things affecting salmon.
3 It doesn't compare them by species. It doesn't give you a
4 prescription for action by watershed. It characterizes the
5 habitat conditions as good, fair and poor, but it does nothing to
6 say which is limiting.

7 Absent those kinds of integrated plans that would allow you
8 to do that sort of prioritization, what Dr. Roni said, and the
9 other tribal witnesses agreed with, the first thing to do in
10 repairing habitat is to reconnect the broken pieces by pulling
11 out anthropogenic barriers such as culverts. That recommendation
12 was not contradicted by any of the practicing biologists who
13 testified, and it is consistent with multiple exhibits and
14 multiple state reports over the years that agree that barrier
15 culverts must be corrected if wild salmon are to recover.

16 Somewhat incredibly, Dr. Koenings disagreed with all that
17 evidence and testified that fixing barrier culverts is bad for
18 salmon. And the only thing he based that on was his statement
19 that opening up additional habitat will let wild fish in to
20 interbreed -- hatchery fish in to interbreed with wild fish.

21 But in response to that concern, your Honor, let me ask a
22 simple question: Where were the wild fish and the hatchery fish
23 before you fixed the barrier? They were all jammed in the
24 remaining habitat downstream, where the competition between them
25 was even more severe. Opening up additional habitat will help

1 solve that problem.

2 Dr. Koenings' other argument was not biological, it was
3 financial, that accelerating DOT culvert corrections will take
4 funds away from higher priority efforts. But his analysis is
5 simply wrong. The reason is simple. If you remember the
6 testimony from Victor Moore, the director of the Office of
7 Financial Management who testified on behalf of the state, he
8 made it clear that the cost the Department of Transportation will
9 incur, which is the vast majority of the costs involved in fixing
10 barrier culverts, come out of a separate budget, a transportation
11 budget, that has a separate funding source in the gasoline tax.
12 The costs that pay for salmon recovery are in the general fund
13 budget. That's where the SRF Board is, the Salmon Recovery
14 Board, that's where the Department of Fish and Wildlife is. And
15 ne'er the twain shall meet according to Mr. Moore.
16 Constitutionally, that gas tax revenue cannot be diverted to
17 anything but highway purposes. And as a historic matter, the SRF
18 Board has never made a grant to the DOT to fix a barrier. As far
19 as Mr. Moore's testimony showed, there has never been use of
20 general fund money for Department of Transportation highway
21 construction projects. It simply has not happened and there is
22 no reason to expect it would.

23 In summary of my second point, your Honor, the evidence at
24 trial was clear, in the absence of an injunction, state barrier
25 culverts will remain on these streams for decades, if not

1 centuries, they will frustrate both tribal efforts to obtain
2 livelihood and the public interest in salmon recovery.

3 The third point I want to address, your Honor, is this: The
4 evidence at trial proved that an injunction to correct state
5 barrier culverts will trigger no state budget crisis. The state
6 has argued that spending money to remedy the treaty violation in
7 a timely fashion is a hardship that tips the balance of hardships
8 in its favor and away from the grant of injunctive relief. But
9 the state's costs and budget arguments are simply not logical.
10 Because culverts wear out, and because under state law and
11 existing agreements between agencies like DFW and the Department
12 of Transportation, when they wear out and get replaced they must
13 be made fish passable. The only costs that can properly be
14 attributed to the injunction that the plaintiffs have asked for
15 is the incremental difference between fixing the culverts faster
16 or fixing them more slowly, because they are going to get fixed
17 no matter what.

18 The state finally admitted in its post-trial brief that it is
19 this incremental or marginal cost that counts. But the analysis
20 the state did of that cost in the post-trial brief is
21 nonsensical. It did not address the relevant margin or the
22 relevant increment, which is the difference in cost between
23 fixing 800 DOT barriers in 20 years or fixing 800 DOT barriers a
24 century or more over the current rate. Instead, the state
25 compared the cost of all 800 barriers in 20 years versus

1 correcting some small fraction of that by using their current
2 correction rate in that same 20-year period. In other words, at
3 the end of the 20 years the state's analysis stops the clock,
4 completely ignoring the fact that there would be costs for
5 another 80 to 100 years under the state's proposal.

6 The state's calculation of the incremental cost is further
7 inflated because, in fact, the plaintiffs are not asking that the
8 state must correct all 800 of those barriers. We have given the
9 state a very substantial out, by proposing if the state will
10 simply finish its ongoing habitat survey, so it actually knows
11 how much habitat is there with a reasonable degree of certainty,
12 that it would only have to open up 90 percent of the habitat, fix
13 enough DOT culverts to open 90 percent. Mr. Benson's testimony,
14 AT-323, shows that should be about 577 culverts. So that is the
15 incremental cost question, your Honor. 577 in 20 years or over a
16 much longer time period.

17 After you take out that 577, the end of the 800 could be
18 fixed at the remainder of their useful life, which is what
19 current state law provides.

20 There is another problem with the state's cost arguments,
21 your Honor. The evidence does not support their claimed cost for
22 fix of \$2.3 million. The state's approach to that average cost
23 has been misleading from the first day of trial.

24 In the state's opening statement there were two culverts that
25 were addressed in particular. One was Mill Creek, which we were

1 told was a \$1.6 million fix, and, quote, was on the medium to
2 smaller side of the fixes. But if you actually look at
3 Mr. Wagner's testimony, he testified that the Mill Creek fix was
4 a 37-foot wide stream simulation structure. It was one of the
5 widest stream simulation structures the state has ever built. It
6 was not on the medium to smaller side.

7 Another example used in opening was Terrell Creek up in the
8 Lummi country. We were told that the cost of that project for
9 the culvert fix was \$2.3 million. If you look at the evidence,
10 that project was a highway project. If you look at the documents
11 in the record, it is a highway project, not an I-4 project. And
12 Mr. Wagner testified it is not possible in a highway project like
13 that to tell what part of that \$2.3 million total cost was
14 because of the culvert fix and what was because of the other
15 highway work being done.

16 So that misleading approach has been compounded by the
17 state's use of a nonrepresentative list of only 38 culverts to
18 come up with its \$2.3 million average cost. On
19 cross-examination, both Mr. Wagner and Mr. Carpenter from the
20 Department of Transportation, admitted they had made no effort to
21 determine whether those 38 culverts on that list were
22 representative of the full sweep of 800 to be corrected.

23 But the plaintiffs did make that comparison, your Honor. And
24 the Court can as well. If you look at AT-323, it lists stream
25 widths for all 800 of the remaining DOT barriers. It shows the

1 38 culverts on that scoping list are significantly larger streams
2 than the norm, and thus will have higher costs.

3 Finally, that \$2.3 million estimate is inconsistent, and
4 inexplicably inconsistent with the 2007 estimate which the state
5 also prepared in a proposed exhibit back when trial was meant to
6 be in 2007. And that 2007 exhibit shows that future DOT
7 corrections could be expected to cost \$850,000 on average.

8 Now, according to the State Department of Transportation's
9 construction cost index, which is in the record at AT-217,
10 inflation from 2007, when the cost was meant to be \$850,000, to
11 2009, when we did trial, was 12 percent. You add that 12 percent
12 to \$850,000, it should have brought the cost up to \$952,000. It
13 does not bring it up to \$2.3 million, your Honor.

14 The misleading nature of the state's testimony and argument
15 regarding the average cost continued when the state's witness
16 turned to address the budget as a whole. Mr. Moore stated that
17 culvert spending would threaten programs for the state's most
18 vulnerable citizens. He said you can't just borrow more money or
19 pull money out of some pot for culvert fixes, because there are
20 debt limits and spending limits under state law.

21 What he didn't say until cross-exam is those social programs
22 for the most vulnerable, like salmon recovery, are general fund
23 programs. And those debt limits he spoke of apply only to the
24 general fund. And the spending limit applies to the general
25 fund. And none of them are relevant to the Department of

1 Transportation corrections that will consume the vast majority of
2 the money needed to vindicate the plaintiffs' treaty rights by
3 fixing various culverts. Nor will fixing the barrier culverts
4 that DOT has cause a crisis within the Department of
5 Transportation's own budget.

6 Mr. Moore acknowledged that the impact of fixing culverts on
7 the DOT budget depended on how much a culvert would cost to fix
8 and how many of them there were to fix. He admitted on cross
9 that he didn't know either of those things. So his statement
10 that fixing barrier culverts is going to remain -- that the
11 safety of millions of Washingtonians is impaired is pure
12 hyperbole, it is baseless.

13 In fact, your Honor, we do not deny accelerating DOT culvert
14 fixes will require some shift in the Department's priorities.
15 But if you look at the total budget for the Department of
16 Transportation, at the time of trial, \$5.8 billion, and the
17 highway construction budget of \$4.4 billion, whatever the
18 incremental cost of correcting these culverts faster is will be
19 dwarfed by that budget.

20 The final point, your Honor, I want to make regarding the
21 evidence presented at trial is this: The injunction will not rob
22 the state of its legitimate discretion; it will not mire this
23 Court or the parties in perpetual implementation proceedings.
24 The injunction is, in fact, minimal in relation to the treaty
25 violations. And the plaintiffs have striven to balance in their

1 injunction terms between very specific language, which would make
2 quite clear the state's obligations, but which the state would
3 surely call too intrusive, and very general language, which the
4 state would say we don't know what it requires, but which is
5 intended to give them full discretion.

6 In numerous places the proposed injunction borrows from the
7 state's own current policy and does no more than insure that
8 current policy becomes actual practice in the future.

9 Provisions that fall under that category include the
10 inventory. The plaintiffs proposed that the existing DOT and DNR
11 inventories of barrier culverts be the basis for what has to be
12 fixed in 20 years or by 2016. The plaintiffs proposed that
13 WDFW's current inventory methods can be continued into the
14 future. The correction schedule is borrowed from state law for
15 the natural resource agencies, that 2016 deadline, and it is
16 borrowed from the Department of Transportation's own 20-year
17 correction deadline, which it had in its own policy documents up
18 until 2004.

19 The design standard, pass all fish at all life stages, is
20 taken from the State Forest Practices Act. The proposed
21 hierarchy, once you decide to build this -- the proposed
22 hierarchy of design options, where you would look first at, do we
23 need to put something there, do we put a bridge there before you
24 look at a culvert, is straight out of the WAC for stream crossing
25 structures.

1 So the injunction would impose some new requirements. And it
2 does so in places where the existing state programs are woefully
3 inadequate. Thus, the injunction would require that the state
4 actually monitor all of its fish passage corrections for
5 effectiveness.

6 The evidence at trial showed that what is currently done for
7 DNR, they go out and look at their culverts, the big ones, after
8 a major storm. In other words, they do a drive by. There is no
9 systematic program of reinspection. For the Department of
10 Transportation, there is a one-year inspection period for a third
11 of the fixes done with I-4 funding. And that is it. There is no
12 comprehensive program. And that is essential to insure that
13 these fixes are actually effective and stay that way.

14 Maintenance, your Honor, is similarly included in the
15 injunction because the current maintenance programs are
16 inadequate. The Department of Transportation has no program
17 aimed at maintenance for the purpose of insuring fish passage.
18 What it has is a maintenance program aimed at insuring the
19 structural integrity of the culverts. And that program, if you
20 will recall, was recently rated the worst of 32 categories of DOT
21 maintenance programs in their management accountability process.
22 One of the regions that comprised the case actually got an F-plus
23 grade for their maintenance program.

24 Finally, your Honor, the injunction would require that the
25 state do something which the evidence shows is essential to

1 prevent ongoing future harm, and that is to develop a program of
2 ongoing inspection and correction of barrier culverts. No agency
3 currently has such a program, and the evidence is clear it is
4 almost inevitable that there will be additional barriers in the
5 future, and they will continue to deprive the tribes of harvest
6 if there is no program to find and correct them.

7 In those places where the injunction imposes new
8 requirements, your Honor, that are not borrowed straight from
9 state practice, the requirements are deliberately phrased
10 generally. They are intended to insure that the state not wholly
11 default on aspects of culvert correction that are essential, but
12 to leave the state as free as possible to fill in technical
13 details.

14 Now, the state portrays this injunction as fraught with
15 complications and intrusions. It is not so.

16 The state contends in its post-trial brief that it will be
17 compelled under the proposed injunction to develop a new adaptive
18 management program. Well, unlike the state, which insists on
19 clinging adamantly to the status quo, the plaintiff actually
20 listens to the concerns of the other side, your Honor. We
21 revised the proposed injunction from pretrial to post-trial and
22 deleted the reference to adapted management. What the injunction
23 would now require is simply monitoring of the effectiveness.
24 That is the essential monitoring that could be used for an
25 adaptive management program. We think that the biologists for

1 the State of Washington will want that, and will do it, and work
2 with their tribal counterparts to develop it, but it will not be
3 required by this Court.

4 Similarly, the state contends that it will have to use
5 whatever design represents best available science. Again, the
6 best available science language has been stricken from the
7 proposed injunction that was filed post-trial. What the
8 injunction now does is merely note that the stream simulation
9 design is currently the best science.

10 The state also contends that it may have to prove to the
11 Court in advance that its designs are adequate, but there is
12 nothing in the injunction that would require that, and there
13 never has been.

14 The state argues that an injunction to prevent it from
15 operating barriers in the future, requiring it to correct
16 barriers in the future, will lead to perpetual judicial
17 supervision. But, your Honor, this is a permanent injunction.
18 That's what permanent injunctions do. They require that the
19 situation change for a long time.

20 On the remand in the Winans case, the Winans brothers were
21 not ordered that they could have three fish wheels in the river,
22 but after five years they could have more. It was perpetual.
23 And when this Court enjoined numerous state regulations in Final
24 Decision One, it was not for a short period of time, it was
25 forever. And should the circumstances change in the future, such

1 that the terms of this injunction become inequitable, the state
2 is free to make a motion to modify under Rule 60, and under the
3 Rufo decision from the U.S. Supreme Court.

4 So, in summary, substantively and procedurally, the
5 injunction the plaintiffs have proposed is limited, and it is as
6 deferential as it can be and still get the job done.

7 We do not deny that there will be some implementation
8 disputes. Although, we note, as the Ninth Circuit recently noted
9 in an unrelated sub-proceeding, things have changed a lot in 20
10 years, in terms of how the state and the tribal technical people
11 get along.

12 We believe that providing some basic standards in an
13 injunction will actually avoid future disputes, more than giving
14 the state no guidance at all in terms of how it is to comply with
15 the treaty duties of the state that the Court has already
16 declared.

17 And to the extent that some of those disputes are technical
18 ones, the Court can refer them. There is the Fishery Advisories
19 Board. The Court can create a culverts advisory board. You can
20 order alternative dispute resolution. You can order mediation.
21 There are a lot of ways to solve those kinds of disputes before
22 they get before the court.

23 Finally, your Honor, in addition to overstating the intrusive
24 effects of this injunction, the state would apply a novel legal
25 test to evaluate it. In their post-trial brief, they appear to

1 argue that every component of the injunction must address a
2 separate irreparable injury. For example, they argue that the
3 plaintiffs must show that they suffered irreparable harm from the
4 current inadequate system of notice to tribes. They must show
5 that they suffered irreparable harms from the current inadequate
6 monitoring systems for culvert corrections. But the state cites
7 no case that requires that every single element of an injunction
8 be supported by a separate irreparable harm. The plaintiffs have
9 been unable to find them. Instead, the principle is very
10 straightforward. A court of equity has broad and flexible
11 powers. Once irreparable harm has been shown, it can reach out
12 and do what is necessary to prevent that irreparable harm from
13 continuing or recurring. In this case, both monitoring and
14 notice of implementation activities are fundamental to insuring
15 that the corrections are done properly and to giving plaintiffs
16 their due.

17 So, in summary on my fourth point, your Honor, the evidence
18 shows that the plaintiffs have suffered irreparable harm and
19 their injunction will do no more than provide the minimum
20 elements of an effective correction program.

21 In conclusion, your Honor, the plaintiffs don't want to make
22 light of the burden this injunction will impose. We understand
23 full well it will require a lot of work. It will require a lot
24 of money. But the alternative proposed by the state is to leave
25 the fate of the culverts, the fate of the salmon and the fate of

1 treaty fisheries entirely in the state's discretion with no
2 injunction. It is to leave the status quo. And we know what
3 that status quo is.

4 The state's alternative would insure that these barriers,
5 which have been declared for the last three years to be in
6 violation of the treaties, would remain for decades, if not for
7 centuries. That would shame equity, that would thwart the treaty
8 promise. The plaintiffs therefore pray, your Honor, that you
9 grant the injunction as they have requested.

10 THE COURT: Thank you very much. Mr. Monson.

11 MR. MONSON: Good afternoon, your Honor. May it please
12 the Court. Peter Monson for the United States of America.
13 First, let me just say the United States joins in the remarks
14 Mr. Sledd just made, as we do in the request for the proposed
15 injunction that was filed post-trial with the amendments
16 Mr. Sledd has outlined.

17 That would bring me to the first of three brief points I
18 intend to make. In our post-trial briefs, we pointed out the
19 fact that the United States has joined in the plaintiff tribes'
20 request for relief militates against any Eleventh Amendment
21 defense the state has argued. We briefed that quite extensively.
22 We pointed out a case that is very much similar to this one, the
23 Mille Lacs Band versus Minnesota case. Unless the Court has
24 questions, I don't intend to address that matter any further. I
25 think we briefed it adequately.

1 Our second point is that the United States places great
2 importance on the correction of culverts in the Pacific
3 Northwest. And there is two points I would like to make under
4 that. First, we presented a witness at the end of trial,
5 Dr. Philip Roni, who discussed the importance of correcting
6 culverts. And I will get into his testimony in just a moment.

7 And the second point is that, although we did not have
8 testifying witnesses to this fact, we did have evidence in the
9 record regarding Forest Service corrections on national forest
10 lands, and the acceleration that they have undertaken. I will
11 briefly address those points as well.

12 The correction of fish-bearing culverts is of great
13 importance, in part because of the rapid response that they
14 provide. As Dr. Roni testified in his direct testimony as
15 rebuttal to Dr. Koenings, reopening habitat that has been blocked
16 by -- whether it is blocking culverts or other matters, is akin
17 to opening the back gate and letting the dogs out. And fish,
18 like dogs, will run free and will go and explore the new
19 territory that they have heretofore been excluded from. In the
20 context of fish, it happens within a matter of literally days.
21 If they can access previously inaccessible habitat, they will do
22 so as quickly as they possibly can.

23 Fish-blocking culverts are a problem not only in terms of
24 fulfilling the tribe's treaty rights, as Mr. Sledd has so
25 eloquently discussed, but it is also important from the

1 standpoint of meeting the Endangered Species Act requirements and
2 recovering salmon to a non-threatened, non-endangered status.

3 As Dr. Roni indicated, and I think Mr. Sledd alluded to this
4 in his remarks earlier as well, there are two first steps that
5 need to be taken for purposes of salmon recovery, to protect the
6 high quality habitat that exists and then, secondly, to reconnect
7 isolated habitats. The culverts fit into that secondary
8 category. Reconnecting isolated habitats is one of the top two
9 most important things that can be done. Correcting fish-blocking
10 culverts fills that requirement very successfully.

11 Dr. Roni testified that reconnecting habitat is one of the
12 most successful restoration actions because it relies on existing
13 habitat. You don't have to create new habitat. Although
14 certainly improvements may be required. And also, as I
15 mentioned, fish recolonize new habitat very, very quickly.

16 In addition, in rebutting Dr. Koenings' testimony regarding
17 trying to address all of the Hs all at once without any
18 prioritization of one over the other, Dr. Roni described that as
19 doing a lot of things across the landscape, but not really trying
20 to address some of the key factors first.

21 That approach is flawed because you do a little bit here and
22 a little bit there, but you never really get to the most critical
23 items. And those, in Dr. Roni's view, were, again, protecting
24 existing high quality habitat and reconnecting isolated habitats.

25 He pointed out that, while limiting factors analyses are very

1 important in salmon restoration, they have to be done correctly,
2 and they have to really, truly analyze what those factors are and
3 how they limit restoration and limit salmon production in those
4 habitats.

5 Habitat reconnection is one thing that can be done very
6 quickly with positive results, without a great deal of analysis
7 required.

8 And Dr. Roni, finally, noted that culvert corrections do not
9 necessarily conflict with other salmon restoration activities.
10 In many cases, such as with DOT highways and roads, the funding
11 sources are completely different. And Mr. Sledd has alluded to
12 that as well. The state witnesses confirm that fact, that the
13 budgets for salmon recovery are oftentimes much different -- come
14 from a different pot of money, whether it be federal money or
15 money expended through what is called the SRF Board, the Salmon
16 Recovery Funding Act board. Those funds are different from where
17 the funds would come from, with respect to Washington State
18 Department of Transportation funds.

19 In short, the injunctive relief proposed by the plaintiffs
20 will not cause the state to have to rob Peter in order to pay
21 Paul in terms of salmon recovery.

22 Now, on cross-examination, Dr. Roni was asked about a
23 PowerPoint presentation. This is the point the state has made in
24 its post-trial brief, to try to paint Dr. Roni's views as
25 suggesting that culvert corrections are not very important and

1 not very productive in terms of salmon recovery, and maybe money
2 should be spent elsewhere.

3 The PowerPoint presentation was lacking a couple of things.
4 One, it was lacking the actual underlying presentation. It was
5 just the bullet points. Dr. Roni mentioned this, and tried to
6 explain, no, that wasn't in fact what he intended to convey with
7 the PowerPoint presentation.

8 Secondly, the PowerPoint presentation was not the result of a
9 comprehensive study, it was simply a hypothetical watershed that
10 was being used to provide an example of how scientists and people
11 in the business of salmon recovery might go about prioritizing
12 recovery actions in a given watershed. It wasn't intended to
13 say, well, these things should be done first because every
14 watershed is different. All of the witnesses seem to agree on
15 that point.

16 Sort of the bottom line here is, with respect to that
17 PowerPoint presentation, Washington Exhibit 200, is that it was
18 really based on a hypothetical estimation, and Dr. Roni clearly
19 clarified on redirect that in fact it was a -- it represented a
20 large underestimation, and that the correction of barrier
21 culverts is still a very important factor in salmon recovery.

22 So this brings me to my third and final point, and that
23 relates to the importance placed on culvert corrections and
24 barrier corrections by the Forest Service. As I mentioned, we
25 were unable to present witnesses at trial from the Forest Service

1 because both individuals were called away, one for a family
2 emergency, and the other was out of the country. But we did --
3 There is evidence in the record regarding the culvert corrections
4 efforts that the Forest Service has undertaken.

5 In 2005, the Forest Service culverts were not in very good
6 shape. The state has pointed that out in prior briefing when
7 they sought to assert a claim against the United States in this
8 very case. However, since that time, the funding effort and the
9 work the Forest Service has done to correct its own barrier
10 culverts on forest land has increased dramatically. The base
11 funding has increased by some 67 percent. I am looking at
12 Exhibit 187, U.S.A. It talks about there have been increases in
13 recurrent funding from 2005 to 2009, from 4.6 million to
14 7.7 million. In addition, there was two substantial, one-time
15 appropriations exceeding \$25 million the Forest Service is using
16 to correct culverts and decommission roads and do other things in
17 the Pacific Northwest and in the case area. A summary of these
18 expenditures and the accomplishments that have been made with
19 those monies can be found at U.S.A. 188, U.S.A. 189 and U.S.A.
20 190.

21 It is important also to note that the Forest Service has
22 developed a very extensive methodology for correcting culverts,
23 that being the stream simulation manual that it uses, which is
24 very similar to the one the state uses. But it uses that on
25 anadromous streams. It uses that methodology exclusively for

1 correcting culverts that it is trying to correct on its lands in
2 the case area.

3 I would also note that the Forest Service is on track to try
4 to meet the same 2016 deadlines that the Washington Department of
5 Natural Resources agencies are seeking to meet.

6 So, in conclusion, from our perspective, we want to see the
7 DOT culverts fixed because oftentimes they are located downstream
8 from national forests. In order to make the improvements that
9 are occurring in the upper stream reaches more effective, and
10 increase production of salmon, we want to see the downstream
11 corrections being made as well. Without those corrections on the
12 state culverts, the federal culvert corrections benefits will not
13 be fully realized.

14 For those reasons, as those stated by Mr. Sledd earlier, the
15 United States urges the Court to enter the plaintiffs' proposed
16 permanent injunction regarding culvert correction. We thank you,
17 your Honor. I will stand for any questions if you have any.

18 THE COURT: Thank you, Mr. Monson.

19 MR. MONSON: Thank you.

20 THE COURT: Mr. Tomisser.

21 MR. TOMISSER: Good afternoon, your Honor. The remedies
22 requested by the tribes in this case, ranging from the
23 acceleration of the state's barrier program to the federal
24 jurisdiction over culvert design, are ultimately aimed to achieve
25 one goal, the increase in the abundance of salmon available for

1 harvest. The abundance theory presented by Mr. Sledd, as he
2 mentioned today, in which every existing barrier is a breach of
3 the treaty, is a treaty that requires no more showing of action
4 under the Steven's treaty than to make a general assertion that
5 abundance is diminished from some unarticulated, undefined,
6 unproven level, and that some state action is a depressing factor
7 upon the number of salmon. That is all the Court needs to adopt
8 as a remedy under the treaty.

9 I think that this is not the correct vehicle for -- it is not
10 a correct vehicle to increase the abundance of salmon. And I
11 think it is important, your Honor, to consider the abundance
12 theory in the context that this treaty was signed.

13 Is the Steven's treaty, a document created in the 1850s, a
14 proper vehicle to solve the challenges posed today by concerns
15 over the abundance of salmon and the scarcity of the resource?
16 If we consider what was thought about at the time the treaty was
17 executed, one of the primary assumptions that has been noted by a
18 number of commentators and courts over the years is that the
19 supply of salmon was thought to be inexhaustible, essentially an
20 unlimited resource. There is the colorful description that was
21 offered at the time of the treaties: Salmon were abundant in
22 such numbers that a person could cross the river without getting
23 their feet wet merely by stepping on the backs of salmon. Such
24 was the abundance available at that time.

25 It is, therefore, not surprising, given that fundamental

1 assumption underlying the treaty, that there is no mechanism
2 built into the treaty to assure any particular level of the
3 resource. There was no reason to think about that at the time,
4 under the assumption that the resource is inexhaustible.

5 The other consideration that was at the center of the treaty
6 at the time it was signed was the knowledge that there was going
7 to be growth, there was going to be settlement, there was going
8 to be an increase in the population. All of these things, or
9 both of these things, were primary considerations at the time the
10 treaty was signed.

11 Fifty years later, your Honor, on September the 27th, 1908,
12 to be precise, the anticipated growth and development happened in
13 a very quantum way, in a way that changed the world forever, in a
14 way that was unimaginable at the time the treaty was signed. We
15 look forward today -- Our own corner of the world is almost
16 unrecognizable from the time that the treaty was signed.

17 It is not surprising, therefore, your Honor, then to consider
18 at the time that the treaty was signed, a vehicle was not going
19 to be capable of solving the problems of today. The problems of
20 today, problems of abundance, problems of scarcity, are modern
21 problems, problems for which new laws have been created to deal
22 with.

23 Although Mr. Sledd takes me to task for mentioning the
24 Endangered Species Act, the state Salmon Recovery Act, the Forest
25 Practices Act, those are modern tools that have been created to

1 deal with the modern problems. There is nothing in the treaty
2 itself that in any way assures any particular level of abundance.
3 It was not part of what was in the treaty, and should not be
4 written into the treaty by this Court.

5 Once the Court begins to consider the abundance theory as a
6 viable cause of action, there is no logical distinction between
7 culverts as a factor that diminishes the relative abundance of
8 salmon and any other limiting factor that the state may possibly
9 be involved in.

10 The Court heard testimony about the four Hs, and how all of
11 them are important factors for salmon recovery, habitat having a
12 variety of limiting factors. The state is involved in every
13 aspect of these four Hs, including multiple impacts potentially
14 on habitat. If the abundance theory is correct, your Honor, that
15 the Court need only identify some state action that creates a
16 downward pressure upon the salmon, then, according to the
17 plaintiffs, that action is now subject to remedy by this Court
18 under the treaty. That's an extension that would be unthinkable
19 at the time that the treaty was signed. It is a right that has
20 never been recognized by a court.

21 Having said that the treaty is not the proper vehicle for the
22 tribes to receive a remedy in this case, that is far from saying
23 the treaty no longer has a purpose. The treaty does have a
24 purpose. The treaty remains viable and contains important rights
25 for all parties to it.

1 The courts have identified two broad, substantive rights that
2 flow from the treaty. The first is the core decision
3 establishing that the tribes are forever to be granted access to
4 their usual and accustomed fishing areas. That right is not
5 involved in this particular case.

6 The second broad right is involved. That broad right deals
7 with the entitlement of the tribes to a fair share of the
8 available catch. If the Court looks at the decision in 1979 from
9 Fishing Vessel, the court describes the second of the two rights,
10 saying, "The purpose of our cases is clear. Both sides have a
11 right secured by treaties to take a fair share of the available
12 fish." That, we think, is what the parties to the treaty
13 intended when they secured to the Indians the right of taking
14 fish in common with other citizens. What the court says there
15 is, it is a right to a fair share of the available fish, not an
16 inherent right to establish a certain level of availability.
17 This distinction is important, your Honor.

18 If you look back a little bit further, we gain more
19 understanding of what Fishing Vessel was talking about when they
20 talked about a fair share, what is a fair share and what did that
21 mean in terms of the treaty.

22 If you go back and look at the Department of Game versus the
23 Puyallup Tribe, you see the analytical roots for how the Court
24 should be applying this particular right to the treaty.

25 What the court established in the Puyallup series of cases

1 was what the treaty was concerned with preventing was future
2 state action, as new territory was developed, that was going to
3 be unfair in its treatment of tribal access to the resource.

4 What the court in that case said was unlawful was any state
5 action that had either the intent or the effect of discriminating
6 against the ability of the tribes to take their fair share of the
7 available fish.

8 And when you look at that ruling in context, it makes sense
9 in historical terms. The concern was we need to allow the tribes
10 to have access to the resource that they had historically
11 depended on. What we are not going to allow the state to do, is
12 to come in, and through state action, or state laws, or unfair
13 practices, push the tribes off that resource, so that when the
14 tribes dip their nets into the water, they come up empty, whereas
15 the non-tribal fishermen are able to take the catch. That is
16 what was prevented. The idea was to insure the tribes the
17 ability to get a fair share of the catch that was available.
18 That is a very different right than the right Mr. Sledd and the
19 tribes are asserting in this case, which is a right to some
20 undefined quantum of fish in a treaty. That is what doesn't
21 exist. But it has become the issue for us today because the
22 fundamental assumption -- one of the fundamental assumptions in
23 the treaty has changed, the assumption that the supply itself is
24 inexhaustible. The problem of abundance, the problem of scarcity
25 is a modern problem, not one the treaty was designed to resolve.

1 I tried to be careful with my opening remarks here about the
2 treaty not being available to remedy culverts, because even under
3 the Puyallup decision and in Fishing Vessel, it would be
4 theoretically possible under that construct for a culvert to be a
5 breach of the treaty. I can describe for the Court in those
6 cases what a prima facie culverts case might look like.

7 If we look at the Puyallup decision in Fishing Vessel, a
8 prima facie culverts case, for example, would include perhaps a
9 tribe that was able to come in and identify that historically
10 they were dependent upon a particular run to catch their fish;
11 and that at some point in time the state had come in and built
12 culverts in a way that was impacting that run of fish, but
13 impacting in a way that was denying the tribes their right to a
14 fair share of that run, whereas non-tribal fishermen were still
15 able to exploit the run. In that situation, you would have
16 evidence of a state culvert that was having a discriminatory
17 impact on the ability of a tribe to take their share of whatever
18 that run would be. That would at least be a prima facie case of
19 a breach of culvert (sic) that would come under the treaty. That
20 isn't to say that the Court would automatically issue an
21 injunction, but at least you would have a prima facie case to
22 review.

23 I want to turn to general considerations for the Court in
24 looking at the remedy that has been requested by the tribes.
25 There are several considerations that the Court needs to take

1 into account when looking particularly at granting an injunction
2 against the state government. The first and most basic rule is,
3 of course, the plaintiffs have the burden of proof in presenting
4 their case to the Court and satisfying the Court on a more
5 probable than not basis that they are entitled to the equitable
6 remedy they are requesting.

7 The second broad principle the Court can see from the case
8 law, is that the remedy must fit the breach, so that we don't get
9 into the problem of the remedy being overbroad. And overbroad
10 remedies are found when the Court's remedy applies to things that
11 haven't been proven as part of that breach and in need of the
12 remedy. That is a significant problem for the presentation of
13 evidence in this case by the tribes. When you look at what we
14 would propose to the Court to be the prima facie case, there is a
15 stunning lack of evidence. In fact, the tribes have never moved
16 beyond the generalized assertion that fixing barriers is good.
17 We know that fixing barriers is good. That's why we have spent
18 tens of millions -- hundreds of millions of dollars trying to do
19 that. The question is, is fixing them -- have they proven that
20 fixing them faster is going to produce any benefit. That's what
21 they haven't done.

22 They have approached the case in an unusual fashion, your
23 Honor, asking for a case-wide injunction to fix the barriers.
24 And yet there is no evidence presented to the Court that all of
25 the watersheds need an injunction. In fact, the testimony

1 presented by the witnesses was that every watershed is different
2 and needs different things.

3 The best way to approach that problem then is in the way that
4 has been described in which plans are developed at the watershed
5 level. More needs to be done. But then you apply the remedy
6 that is needed for that watershed and for that species. A
7 one-size-fits-all remedy over the entire case area, in light of
8 the testimony that not every watershed needs that remedy, is
9 inherently overbroad.

10 Another consideration for the Court, and this one is
11 fundamental, is the problem of a federal court getting into the
12 area of institutional reform. I do believe that the remedy
13 requested by the tribes in this case in some respects does cross
14 the line into institutional reform, and all the federalism
15 concerns that flow from that.

16 This is how I think they do that in two specific ways: First
17 of all, although they presented it innocuously, plaintiffs asked
18 the Court to take control over the design of culverts. Currently
19 under state law, the state can fix culverts using stream
20 simulation, the hydraulic method, or no slope, all of which are
21 designed to pass fish at all stages. That is what is currently
22 allowed under state law.

23 What the plaintiffs have asked the Court to do is to say, no,
24 stream simulation must be the default except in emergency
25 circumstances. That is an act of institutional reform, because

1 the state court is telling the state, you cannot do something
2 that is currently allowed under state law, you must choose only
3 this option.

4 The much larger concern when we look at the institutional
5 reform is the effect on the state budget. And I will get into
6 this cost dispute in a little bit. But regardless of whether you
7 think the state's numbers were accurate, or Mr. Sledd's numbers
8 were more accurate, underneath either analysis, as Mr. Sledd
9 admitted in his closing, the Court is going to be reorganizing
10 the state's budget to some extent. The Department of
11 Transportation budget, or whatever budget, in order to meet the
12 goal of repairing the culverts within a 20-year period, the
13 plaintiffs in this case acknowledge, the spending priorities are
14 going to have to be reorganized to do that. Once the Court sets
15 a performance goal that has to be met by the state that requires
16 the reorganization of the budget, you're instituting
17 institutional reform.

18 The reason I mention that, your Honor, is because
19 institutional reform is not a matter to be taken lightly. And
20 I'm sure the Court doesn't take it lightly. When you look at the
21 cases in which institutional reform has been ordered, they are
22 generally cases where the Court is facing a recalcitrant
23 defendant, a state actor who is defiant of federal law or simply
24 has no ability to come into compliance with federal law.

25 This is an aspect of the case that I get most discouraged

1 about when I hear Mr. Sledd disparage the efforts that have been
2 made. Far from being a recalcitrant actor, the State of
3 Washington in this case, by the undisputed evidence, is actually
4 a leader in the area of salmon restoration and recovery. The
5 State of Washington, from scratch, without a threat of federal
6 court intervention, developed a program for the inventory, the
7 prioritization and the correction of a barrier system on its own,
8 and put that system into place.

9 It has been consistently funded through the years through a
10 variety of sources. It has developed a model for deciding how to
11 spend money to get the most bang for the buck. That was done
12 through the development of the priority index. The state has
13 been recognized throughout the nation as being a leader, far from
14 being the recalcitrant defendant that courts generally reserve
15 institutional reform awards for.

16 When you look globally at what the state has done, you look
17 at the SRF Board spending. The State of Washington over the last
18 decade spent \$143 million on salmon-wide recovery projects. We
19 have put programs into place that qualify for federal assistance,
20 thereby increasing our ability to fund projects. The federal
21 government contribution to that is \$216 million, for a total of
22 \$360 million in one decade, spent by the Washington State Salmon
23 Recovery Board, an office whose functions are overseen by the
24 governor's office, and who make decisions based on the very work
25 of people that were witnesses in this case, state biologists,

1 tribal biologists, federal experts who develop the plans to get
2 funding, to develop the priorities for how they should be spent.

3 You can see as a subpart of these totals, 21 million on
4 barrier corrections, another 22 million from the federal
5 government. That money is in addition to the money spent by DOT
6 and DNR to correct their barriers. All of this work is being
7 done. None of it places the state in the position of being a
8 recalcitrant defendant unwilling to do what is necessary for
9 salmon. What the state has done is taken extraordinary
10 leadership and taken the responsible steps within its means to
11 get as much done, and to do it in a scientifically sound way, the
12 product of collaboratively scientific work, not the product of
13 litigation and court decisions on what ought to happen.

14 So what has happened? Mr. Sledd contends there is no plan.
15 In fact, there are plans. This comes from an exhibit admitted
16 into evidence. It is the key excerpts from the Puget Sound
17 Recovery Plan. It is called the Chinook plan. But it will
18 benefit every fish that swims in Puget Sound. It is a plan that,
19 according to the scientists, has a 50-year time horizon, at a
20 cost of \$1.24 billion, and more than a thousand associated
21 actions. That plan is in place, your Honor. And it is not the
22 only plan.

23 Dr. Koenings testified that more of this work needs to be
24 done, that what we need to do is look more closely at each
25 watershed so we know what each watershed is. That work is being

1 done and it is in progress. As Dr. Koenings described, these
2 coordinated plans and trying to get this coordinated is of
3 relatively recent origin. The plans are working, they are
4 scientifically sound, and ought to be allowed to continue to
5 work.

6 Another example is the Hood Canal Summer Chum plan. In fact,
7 Kit Rawson also talked about the plan -- the Snohomish ten-year
8 plan in that particular case.

9 As a part of these plans, your Honor, an extensive limiting
10 factor analyses were done. If we look just at habitat, what the
11 witnesses testified was that every watershed has different
12 problems and needs different solutions.

13 Significantly, the plans do not place barrier corrections at
14 the top. Barrier correction is certainly a part, and it is more
15 important in some watersheds than others, but estuary restoration
16 actually ranks at three-quarters of watersheds as a top priority.

17 Why should the Court order the shift in this case, as we
18 present to the Court, of \$164 million in funds to put barriers at
19 the top of the list, when the analysis that has been done so far
20 shows the Court that actually estuaries is where that effort
21 ought to be directed?

22 When we look at the work that has been done by individual
23 state agencies, in addition to what has been done through the SRF
24 Board and other agencies working on salmon recovery, you look at
25 what DNR has accomplished in this case, the correction of more

1 than 700 barriers within a decade, as Alex Nagygyor testified in
2 this case, although it will be close, they believe they are on
3 track to meeting the goal of fixing the barriers by 2016. The
4 tribes are fine with that target. There is no need to federalize
5 that portion of the plan.

6 When we look at DOT, DOT's barrier corrections, through a
7 combination of a couple of different sources, as was described to
8 the Court, first, in the course of simple highway construction
9 projects where a correction can be made within the scope of a
10 highway project, the correction to the barrier would be made at
11 that time, generally also trending now heavily towards using
12 stream simulation as the method of choice.

13 The other source of barrier correction is in a unique
14 standalone program, the I-4 program, which contains a specific
15 budget line just for barrier corrections. As the Court can see,
16 the program has been funded consistently from its origins in the
17 early '90s up through today, to where we are up to just under
18 \$20 million. That rate of budget increase, your Honor, is a
19 multiple of what Mr. Monson has just testified was done on behalf
20 of the federal government with their 67 percent. We are closer
21 to a 300 percent increase on the I-4 alone. And, of course, that
22 doesn't count the other fixes being done by DOT, DNR and through
23 the SRF Board. So, in fact, the state's efforts at barrier
24 corrections in this case is broad and crosses multiple agencies.

25 As a result of various efforts that have been done, your

1 Honor, the salmon recovery plans have a slide that puts together
2 a snapshot essentially of where we are and what remains to be
3 done. You can see that over the last decade in this particular
4 area -- This is just looking at habitat and the limiting factors
5 relating to habitat. You can see passage there on the right side
6 of the pie chart. Passage, this is barrier correction
7 essentially, actually affects amongst the fewest of the ESUs, the
8 evolutionarily significant units. It actually affects fewer than
9 most of the other corrections. And yet this is the area where
10 most of the work has been done already. The plaintiffs have
11 provided no evidence as to what additional gain might be achieved
12 if that effort were to be accelerated, and accelerated at the
13 expense necessarily of something else. Because the shift in
14 funding, your Honor, has to come from somewhere. Mr. Sledd has
15 described the budget. He has described everything except where
16 that \$164 million per biennium is going to come from. It has to
17 come from somewhere.

18 I review that evidence with the Court really for the purpose
19 of talking to the Court about the lack of need for an injunction,
20 the lack of need for this Court to begin down a course of
21 institutional reform. The State of Washington in this case is
22 not the kind of defendant for whom that sort of remedy is
23 awarded.

24 If we look beyond that, your Honor, to the more specific
25 elements of what is required in order to impose an injunction,

1 the first major element is whether or not there has been
2 significant and irreparable injury.

3 Well, when we look at the history of tribal harvests in this
4 case, what we see is fluctuation in what the tribal harvests have
5 been. This evidence goes back to the date of the Boldt decision,
6 and then up through 2007. And so what we can see is fluctuation.

7 Mr. Sledd has emphasized repeatedly in the brief that this is
8 a case about culverts; it is not a salmon recovery proceeding, he
9 says, it is the culvert proceedings. Well, presumably we would
10 have had some evidence about what is the impact on culverts in
11 relationship to tribal harvests. Now, on summary judgment the
12 Court said, I am not going to require mathematical precision in
13 presenting that analysis. What the Court didn't say, I am going
14 to allow you to proceed and get a remedy with no evidence
15 whatsoever. That is exactly what this Court has, no evidence on
16 either a watershed basis or a case area wide basis that gives the
17 Court any means at all to measure how much is being done.

18 Mr. Sledd suggests in his argument this kind of mathematical
19 formula. That is the methodology that was rejected by this Court
20 as unsound. You cannot take the potential area that might be
21 available and multiply it by some number and come up with
22 production. That is the methodology that was rejected. The
23 tribes presented nothing else in this case to satisfy the burden
24 of what that injury would be.

25 The plaintiffs do bear the burden of showing what the degree

1 of that injury is. If the Court can't have some way of measuring
2 what is the extent of that injury, the Court has no way of
3 knowing whether or not the remedy it's imposing is going to match
4 the breach. If you can't know, the Court is stuck with
5 speculation as to how much injury was actually caused by the
6 culverts, and what am I going to get if I order the state to
7 accelerate this program. The Court doesn't have anything to work
8 with in looking at that.

9 Interestingly, your Honor, if you look at this particular
10 chart, and I have superimposed a red line on it -- This is not
11 on the exhibit that is admitted. This red line marks 1991, which
12 is the beginning of the state's barrier correction program. And
13 interestingly, it was the plaintiffs' burden in this case to
14 prove that culverts had a deleterious effect on the tribal
15 harvests. It doesn't look that way, does it? If you look at the
16 left side of the case, and you look at my next slide, which is
17 the state highway center line chart, what you can see is that
18 from the late '60s, up through today, the miles on the state's
19 center line miles have remained essentially constant since the
20 late '60s. About 98 percent of the current system has been the
21 same, along with all of the associated culverts and barriers in
22 that system.

23 So if we weren't fixing barriers in any kind of a regular
24 pattern until 1991, then 1990 or so should be the period of time
25 in which the culverts are having a maximum impact on tribal

1 harvests. That is when they are the worst. That is before
2 anything is getting fixed. What do we see when we look at the
3 evidence produced in this case about what tribal harvests were?
4 It is going up at a time the culverts are presumably at their
5 worst in this case.

6 When you look at the other side of the chart, once the state
7 starts repairing barriers in a consistent manner, you can see
8 generally the trendline of tribal harvests is down. According to
9 this evidence, Mr. Sledd's case would have established that
10 fixing culverts must be bad for salmon. That is, of course, not
11 the case, as we know.

12 What is significant here, your Honor, is the absolute lack of
13 any correlation between the state highway system and tribal
14 harvests.

15 What we heard from tribal witnesses and state witnesses in
16 this case is the extreme spikes that we see in the mid to late
17 '80s are attributable to overharvest, harvest levels that were
18 irresponsible and not designed for sustainable growth. That is
19 why those spikes are high. There is no relation there to
20 culverts. Fortunately we have a better cooperation now between
21 state and tribal biologists and fisheries management, witnesses
22 like Lorraine Loomis, who sit and make decisions about fishing
23 seasons, and insuring that we have responsible harvests going
24 forward in the future.

25 Further problems with the plaintiffs' proof in this case, and

1 to emphasize the generalization they make about how much of a
2 difference fixing culverts is going to make, can be seen on these
3 slides, the slides that both Tyson Waldo and Brian Benson
4 generated that show all of the different culverts, the state and
5 non-state culverts, that block.

6 This evidence is presented to the Court from the state's view
7 not to blame other landowners or, as Mr. Sledd says, to exculpate
8 the state because somebody else is also bad. That is not the
9 reason this evidence is presented to the Court. The reason this
10 type of slide gets presented to the Court is to inform the Court
11 about what is going to be the effectiveness of the remedy ordered
12 by the Court.

13 Courts generally will not order injunctive relief and mandate
14 action to be taken without some certainty about what we are going
15 to get in return. What we know in this particular case from the
16 evidence presented is there are only 42 streams that are not
17 affected by other culverts, and that there are over 200 instances
18 in which non-state-owned barriers are downstream of the state
19 barriers, and that the overwhelming majority of culverts that
20 exist in the state are not state owned.

21 We don't put this out to blame other landowners, but we put
22 it out to raise the concern to the Court of how is the Court to
23 know, based on the evidence produced from the plaintiffs, what am
24 I going to get if I allow this acceleration to happen, to what
25 purpose is that acceleration actually going to accomplish the

1 goal for which has been set forth. I submit on the evidence that
2 has been presented, the Court has no way to know what, if
3 anything, is actually going to be produced.

4 The plaintiffs have failed to provide the Court with any
5 specificity necessary to show that they do, in fact, suffer
6 irreparable injury due to culverts in this case.

7 The next factor for the Court to consider in weighing the
8 remedy is the balance of hardships to the parties. When you say
9 a balance of hardship, that necessarily implies that the Court
10 will weigh on one hand against something else on the other. So
11 presumably in this case we should be weighing what is the injury
12 to the tribes and what are we going to get if we order the remedy
13 that they ask for, and, on the other hand, what is the cost of
14 that remedy going to be, and am I going to actually get it if I
15 order this remedy to be granted.

16 I would remind the Court that the correction of culverts, I
17 think as I have said in opening, you don't send the maintenance
18 crew out there with a shovel and a bag of sand to fix a culvert
19 in a day. These are months, if not years, in the planning,
20 permitting, processing to get these sorts of projects done. They
21 are significant endeavors that have to be engaged in by the
22 state. The state's rate of correction -- I think Mr. Sledd was
23 erroneous. The DOT rate of correction that you can see is closer
24 to 14 a year. And that is just the DOT. That is not the SRF
25 Board corrections or the DNR corrections.

1 So if the Court is going to consider the balance of interests
2 in this case, what does the Court have on the tribal side of the
3 ledger in terms of what is the injury and what is the return? As
4 I have presented to the Court, the tribes have nothing but the
5 generalized notion that doing something for salmon must be good,
6 fixing barriers must be good, and a good thing to do. The state
7 doesn't disagree with that. That's why we do it.

8 The question here is what evidence was produced to the Court
9 to show that acceleration of that program is going to achieve
10 some benefit that the Court can describe, a measure in some real
11 term beyond that generalization.

12 On the other side of the ledger is the cost. There is a
13 financial cost. There is also a systemic cost for the Court to
14 go down this path.

15 Let me talk first about the financial cost. The state, in
16 presenting its cost numbers -- primarily Jeff Carpenter was the
17 one who knew the most about this, presented on behalf of the
18 state, did not present the Court with 38 random projects. These
19 projects from this particular exhibit are the next 38 projects to
20 be done. Paul Wagner testified that these 38 projects are
21 typical of the sorts of projects to happen in the future.

22 When you look at the next 38 projects, the average cost of
23 all of them is \$3 million. If you take out the Chico Creek
24 correction, which is uniquely expensive, the average cost comes
25 back down to 2.3. The reason we say that it is 2.3, your Honor,

1 rather than the other number, is because, if you look at the
2 testimony of Mr. Carpenter, he described the things that go into
3 this estimate. The things that go into this estimate include
4 items that are not included in the fish passage report, the
5 historical data cited by the tribes.

6 As Mr. Carpenter explained, the data relied upon by the
7 tribes to reach their number doesn't include professional
8 engineering costs or right-of-way or risk. The State of
9 Washington is required to include those elements when it presents
10 a budget proposal to the legislature. It is this sort of
11 document that the state uses when it goes to the legislature to
12 request funding for projects that is utilized, not the historic
13 costs.

14 When you look at the total costs, your Honor, there are 800
15 barriers to be corrected, and Mr. Sledd says that each and every
16 one of them is a breach. He talks about fixing only 90 percent
17 of them. I don't know where that comes from. There is no magic
18 to the 90 percent at all. They insist that all of them be done.
19 For DOT, that is 800, 1.6 or \$1.8 million in costs to do that.
20 And it is not set over any years longer than 20 under the
21 plaintiffs' injunction. The plaintiffs say at least 90 percent
22 of them must be done within 20 years.

23 And so if you look at the 20-year horizon that the plaintiffs
24 set out and have asked this Court to impose on the DOT for the
25 correction of those barriers, and you look at the \$2.3 million

1 average per barrier cost, that turns out to be \$184 million per
2 biennium to get that done.

3 Currently the I-4 budget, which is the standalone budget to
4 accomplish this, is budgeted at just under \$20 million. That is
5 \$164 million per biennium that this Court would be shifting away
6 from other projects in order to make barrier remediation a
7 priority. That is a substantial amount of money, your Honor,
8 when you look at what can be done with that sort of funding.

9 The Court is being asked to order that shift of funds with no
10 certainty as to how many salmon are actually going to be
11 produced, what effect that is going to have on the tribal
12 harvest.

13 The final element of cost that I want to talk about is the
14 systemic cost of granting this injunction. Mr. Sledd noted one
15 of the other sub-proceeding cases in which the Ninth Circuit has
16 noted that things have improved, the relations between state and
17 tribal biologists over the last 20 years have gotten better. The
18 state and the tribes have shown an ability to work together. The
19 plans that we have talked about, the plans discussed by
20 Mr. Koenings, the plans, excerpts of which were submitted to this
21 Court, the testimony of Kit Rawson, all talked about state and
22 tribal members working together in a collaborative way on a local
23 level to figure out what each watershed needs, what each species
24 needs in this sort of collaborative environment. I'm sure there
25 are disagreements about what must be done, but they are working

1 it out, and the plans are coming together.

2 Instead of having a collaborative scientific analysis and
3 decisions about what should be done and in what order they should
4 be done, the plaintiffs are asking this Court to step in and sit
5 at the captain's table of that effort. It will now be for the
6 Court to decide in what order things must be done, the product of
7 litigation rather than the product of scientific collaboration.
8 This is one of the bottlenecks that Dr. Koenings talked about.
9 It would be inevitable.

10 Once the Court goes down the path of deciding that any
11 downward pressure on salmon reduces abundance and is therefore
12 within my grasp to remedy under the treaty, this Court will be
13 presiding over every impact on salmon. There is no logical
14 distinction between separating the culverts case from any other
15 downward pressure.

16 The Court, contrary to what the Ninth Circuit has recently
17 talked about, should not be in the position of a permanent
18 federal agency managing fishing.

19 The plans, your Honor, are in place. The state has been
20 active in working on those plans. More needs to be done. More
21 is being done. The state has been a consistent actor in good
22 faith. The Court, we would ask, should decline the invitation of
23 the plaintiffs to sit now in perpetuity and decide how the
24 resources ought to be spent.

25 It is not a small thing for this Court to simply brush off

1 and say, well, that really won't happen. Why wouldn't it happen,
2 your Honor? Once the Court accepts the abundance theory as the
3 entre into regulating impact on salmon, there is nothing that
4 would be beyond the power of this Court to entertain in order to
5 remedy that.

6 The Court I think has to come to grips with the fact that the
7 treaty is a valuable document, a continuing document, but it is
8 not the solution for every problem posed by modern society. It
9 is not the vehicle to address problems of abundance and scarcity.

10 The Court should reconsider, we believe, the extent to which
11 it may have bought into the abundance theory, without a showing
12 that an abundance and availability of the tribe to access their
13 share was actually being caused in an unfair manner by state
14 action. Without that, the Court is simply placing itself at the
15 seat of the center of salmon restoration efforts. We think that
16 is inappropriate, and the Court should decline that invitation.
17 Thank you.

18 THE COURT: Counsel, before you step down, I realize
19 that the state's post-trial brief was probably a collaborative
20 effort of several people, yet your signature is the first one
21 that appears on there, so I am assuming you had a good hand in
22 putting this together. On page 30 of your brief you talk about,
23 in paragraph D, that, "The state should have the opportunity to
24 revise its program before any judicial intervention." What did
25 you mean by that?

1 MR. TOMISSER: That is a reflection, your Honor, of the
2 cases that talk about the reluctance that a court would have to
3 simply jump into institutional reform without giving a defendant
4 some idea of what it expected, and allowing that defendant to
5 then see if it could come into compliance without actually having
6 an injunction in place. It was simply a discussion of that as a
7 possibility that courts have sometimes exercised rather than
8 coming right out and taking control and entering an injunction.

9 The court would essentially set forth its view of what
10 federal law requires, and then give the state some time to come
11 into compliance before actually entering the mandate. That was
12 the point that was being discussed in that section of the brief.

13 THE COURT: That's what I thought you meant. How much
14 time would you consider would be appropriate?

15 MR. TOMISSER: Since I don't think the Court should be
16 considering an injunction at all --

17 THE COURT: This is all hypothetical, Mr. Tomisser.

18 MR. TOMISSER: Apart from hypothetical, I really don't
19 think the Court should be entertaining an injunction.

20 In terms of a time frame, I think what would be appropriate,
21 if the Court was concerned about what is the rate of correction
22 and what is actually being done, what is the effect that we can
23 see, if any, on the harvest. The Court I think would want to set
24 some sort of a benchmark, collect enough evidence so that the
25 Court could determine more specifically, okay, what is the tribal

1 harvest and what is, in those watersheds where barriers are an
2 issue, creating pressure on the salmon, to what extent do those
3 pressures exist, and what is the pace we can see of fixing those,
4 and then to get a result.

5 Now, I think you would have to turn to the scientists
6 involved and ask them, okay, if we have a particular watershed,
7 and we know there are barrier culverts on that watershed, if we
8 fix them, how quickly should we see results and be able to
9 measure what we are getting? I think then the Court would have
10 an answer to say, well, okay, that gives me some idea as to how
11 long I would want to wait and see if the plans are working.

12 It is hard to pick an arbitrary number --

13 THE COURT: I understand.

14 MR. TOMISSER: -- without the scientists here to say --

15 THE COURT: Most of them are sitting back there. I
16 understand. I guess what I am trying to get a grasp on, are we
17 talking two, three years? Are we talking a decade?

18 MR. TOMISSER: It would be my hope -- And now I am
19 happy to guess a little bit here. In terms of what is the
20 available data that we might have today, so that we don't have to
21 start with a benchmark today, but maybe we could look at some
22 historical information to determine, okay, what was the situation
23 in the past, and then how quickly did I see results from fixes
24 that were made. Hopefully that data already exists, and so the
25 Court could have an answer to that question fairly quickly, and

1 we wouldn't have to start from scratch and having to go out and
2 make a new assessment. I think the data that has been collected
3 by the state is pretty robust, and we would probably allow that
4 sort of inquiry to be made, but I am reluctant to promise it off
5 the top of my head.

6 THE COURT: All right. Thank you.

7 MR. SLEDD: By my clock, your Honor, the second game of
8 the doubleheader starts within ten minutes. I will try to stay
9 within that.

10 I would like to address your Honor's questions to
11 Ms. Tomisser. In the plaintiffs' view, your Honor, we had a
12 summary judgment that laid out some benchmarks, that said that
13 the culverts violated the treaties. And we waited three years
14 for the trial. The purpose of the trial was to come in and show
15 how do we fix them. What the state came in with was saying, we
16 don't want to do anything different.

17 Where courts have gotten in trouble is where a district court
18 has entered an injunction without bothering to ask and have that
19 hearing. We have had that hearing. There is abundant evidence
20 to do exactly what Mr. Tomisser suggested, which is to set some
21 basic guidelines. That is what we have tried to do in the
22 injunction.

23 Now, if the Court looks at this evidence and thinks, you
24 know, there is a piece here that went too far, let's cut it back,
25 fine. That is your prerogative as a court in equity. But to

1 throw out any issue of guidance to the state now, and simply toss
2 us to the winds to go out and try to come up with some
3 integrated, complex plan that will figure out everything to do
4 about salmon, goes well beyond the scope of this case. And it
5 would postpone the vindication of treaty rights that the tribes
6 have been waiting for for a long time.

7 We would urge the Court not to go that route, but to enter
8 some injunction. And then, as the state has said, their
9 technical people and the tribal technical people can try and
10 flesh out the details. We need that skeleton in place.

11 I said I wasn't going to go back and talk about summary
12 judgment. I can't resist a couple of comments. There is an
13 awful lot that the treaties do not say. The treaties don't say
14 you can't put in fish wheels that keep the tribes from getting
15 any harvest. They don't say you can't put in a fence that keeps
16 them from their fishing places. They don't say you can't have
17 thousands of non-Indian sport fisherman that monopolize the
18 harvest. The treaties were not intended to be empty documents.
19 They are intended to be effective permanently.

20 And what the tribes bargained for was not, as the state seems
21 to suggest, the graces of future state salmon recovery law. They
22 did not bargain for a federal statute at some indefinite point in
23 the future that says we will try not to make these fish extinct.
24 They received very definite and specific promises from Isaac
25 Stevens on treaty grounds across this state that their right to

1 fish would be unimpaired, even if they sold their land; they
2 could continue to fish, as they had before, forever.

3 The treaty has others purposes as well. The fisheries have
4 to be shared with non-Indians. There is a clear expectation that
5 the state would be opened up to non-Indian settlement. That's
6 why Stevens was there. But just because the treaties didn't
7 anticipate every possible complication, does not mean a court has
8 no role and the treaty has no role in trying to reach
9 accomodation and adjustment which the Supreme Court referred to
10 in Winans, the very first of these disputes to get before the
11 Court.

12 There were no black and white rules laid out. It was a tough
13 job that equity courts get paid to do, try and balance those
14 interests. And to balance them in light of the purpose of the
15 treaties, and to balance them, as the law says, with a full
16 understanding of the way that the tribes would have understood
17 the treaty promise.

18 And when the state says that the only thing the treaty
19 promised was they will get treated fairly, that if the state
20 destroys all the fish, it will destroy them for everybody, that
21 is not the treaty promise. That is not what the tribes would
22 have understood on the treaty grounds.

23 This treaty does more than just prevent discrimination. It
24 does more than just say that the ESA will protect you at some
25 point in the future. The tribes bargained for one promise. It

1 is in that treaty. And they bargained for it to be enforceable.

2 With regard to the state's recalcitrance or reluctance or
3 leadership or bad faith, there is no case the parties have cited
4 that said that bad faith is an element of getting injunctive
5 relief. There is a four-part test that is familiar to all of us.
6 The tribes and plaintiffs believe we have shown all four parts of
7 those clearly. If there had been bad faith, I can tell you we
8 would be asking for a lot more in terms of detail on this
9 injunction.

10 Rather than go through again the whole argument of is it bad
11 faith, is it recalcitrance, let deeds speak louder than words.
12 Look at what has actually happened on the ground, at the
13 magnitude of this problem and at how long it will persist. And
14 that's what demands injunctive relief.

15 Again, with regard to recovery plans, where is the Coho plan?
16 We have a Chinook plan for Puget Sound. Where is the coastal
17 salmon recovery plan to help Mr. Johnstone, who talked about the
18 loss of the fish that he grew up fishing for? There aren't any.

19 And, yes, there are some sub-basins that have a slightly more
20 developed plan than others. Mr. Rawson, I believe, actually
21 testified to the Snohomish sub-basin plan that Mr. Tomisser
22 mentioned. They need to be everywhere before anyone can actually
23 say, do this before that before the other.

24 In the absence of that, I fall back on that first principle
25 that Mr. Wasserman said, more habitat would help the fish, and

1 the first principle that Dr. Roni said, which is, if we don't
2 have these detailed plans, the first thing to do is open up the
3 habitat.

4 I want to respond briefly to this graph issue. I will try my
5 freehand here. We will see what happens. I think the graph that
6 Mr. Tomisser showed of the tribal harvest was something like
7 that. He said, well, you know what, the culverts were all in
8 here before, they were over on the left side of this, so how come
9 the harvest is going up when the culverts are already there.
10 Well, you know what, the culverts were there, a lot of them,
11 before. A lot of them have been wearing out and becoming
12 barriers as time goes on. But if there were no culverts, doesn't
13 it make sense that that's what we would see?

14 What has happened is that the culverts that have been there
15 forever have lowered the baseline. And all these other
16 fluctuations, in this case the upward pressure here, because the
17 tribes are gearing up after the Boldt decision, it is
18 superimposed on the ones already at a depressed level of fish.

19 This is a red herring to say, oh, my gosh, we put the
20 culverts in 50 years ago and you're talking about a diminished
21 harvest today. The point of the diminished harvest today is
22 things are bad, they have been bad a long time and they are
23 getting worse, and it is time to act.

24 The state says, your Honor, there is no evidence that
25 accelerating correction will actually benefit things. I would

1 direct the Court's attention to one exhibit, AT-095, prepared by
2 the very program of the Department of Fisheries that fixes
3 culverts, the SHEAR program -- that used to fix culverts. What
4 it says is, "The benefits are directly proportional to the number
5 corrected each year." That is not rocket science. And it is in
6 there.

7 I am not going to try to do the math. I suppose I could, but
8 if your Honor will do the arithmetic, him or herself, with regard
9 to the number of culverts fixed, 225 tried by the state, a number
10 of them that are not successful, 176 left, and that's since 1991.
11 Do the math. It works out to about six and a half a year. And
12 we have over a century still to go.

13 So absent questions from the Court, that's all I wanted to
14 say at the moment.

15 THE COURT: Thank you, Mr. Sledd. Counsel, I know we
16 have another argument scheduled for this afternoon, another
17 sub-proceeding here, another issue that has come up regarding the
18 halibut fishery. There is no doubt, I think, that all parties to
19 this case wish for the same end result, more salmon in the
20 future. The disagreement obviously is how to get there.

21 There is also no doubt this case highlights just how complex
22 the problem is. And perhaps more accurately stated, how complex
23 the solution may be. And here we are only talking about culverts
24 and one of the Hs of the four Hs that all of the experts
25 discussed. And, of course, I am only referring to the factual

1 issues, not the myriad of legal issues that arise when a court is
2 asked to basically impose an extraordinary remedy, which is
3 injunctive relief, ordering the state to take specific actions
4 within a very specific time.

5 I think everyone who ever practices in court understands that
6 litigation always has inherent built-in limitations. And
7 cooperative collaborative effort by all stakeholders always makes
8 greater sense. However, sometimes there is no other resort, and
9 that's when courts must step in, albeit reluctantly, when we do
10 so.

11 There has been a lot of evidence produced in this particular
12 case, a lot of material for the Court to consider, and I will
13 take a careful look at it. I will try to get you a ruling as
14 quickly as we can. Thank you all very much. We will be in
15 recess.

16 (Adjourned.)
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CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning